

WILLAMETTE LOGGING COMMUNICATIONS, INC.
SPRINGFIELD RADIO COMMUNICATIONS, INC.

IBLA 83-327

Decided April 10, 1985

Appeal from decision of the Eugene, Oregon, District Office, Bureau of Land Management, dismissing protest against radio communications site right-of-way OR 28799.

Appeal dismissed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way-- Rights-of-Way: Applications--Rules of Practice: Protests

In adjudicating a protest against an application for radio communications right-of-way, the Bureau of Land Management is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

APPEARANCES: Joel S. Kaplan, Esq., Eugene, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On June 23, 1982, the Eugene, Oregon, District Office, Bureau of Land Management (BLM), published notice in a local Eugene newspaper soliciting proposals prior to August 16, 1982, to enable development of a two-way radio transmission site on Buck Mountain, near Eugene, capable of serving at least 20 two-way radio users. Prior to publication of the June 23 notice, BLM had initiated a plan for future development of an existing radio site at Buck Mountain, and had obtained in response an application for right-of-way filed by Motorola, Inc. (Motorola), on August 7, 1981, which proposed detailed specifications for a radio building and a tower 140 feet in height. At the time of the application by Motorola, the Buck Mountain site was occupied by three buildings with adjacent antennae which served 15 other radio users including appellants Springfield Radio Communications, Inc., and Willamette

Logging Communications, Inc. Both the proposed and the existing Buck Mountain stations employ unmanned microwave and UHF-VHF communications equipment for two-way radio transmissions.

In the course of the radio-site plan development a meeting was held on January 26, 1982, which was attended by representatives of both appellants, Motorola, BLM, and other interested two-way radio users. The possibility for interference with appellants' existing radio transmissions by the additional radio facilities as proposed by Motorola was discussed. Later, in a May 12, 1982, letter to BLM, appellant Springfield Radio Communications, Inc., commented upon an April 5, 1982, draft plan of site development furnished by BLM to appellants and other interested parties. The BLM plan proposed on April 5 included construction of a building to house multiple radio-user equipment and erection of a tower no more than 50 feet in height, unless justification could be supplied for construction of a higher antenna. Three suggestions were made by appellant's May 12 letter concerning placement of the proposed radio facilities on the ground and allocation of costs between users arising from electromagnetic interference with existing facilities by the new station. Motorola also responded to the April 5 plan by letter dated May 7, 1982, which explained reasons why, if the proposed new radio facility were to be able to serve numerous users, it would require a tower higher than 50 feet.

Meantime, public comment received by BLM concerning the need for increased user capability for the Buck Mountain site indicated increased public interest in use of the site extending beyond the capability of the existing facilities. Following comment by users and the general public, the notice of June 23, 1982, soliciting proposals for expansion of the Buck Mountain site was published. The published notice, which was also directly furnished to known interested parties including appellants, did not include detailed design specifications. The design specifications were referred to by the June 23 notice and were available from BLM. They were, however, changed from those appearing in the April 5 draft so as to permit construction of a radio building 12 feet high and a tower 150 feet in height. By letter dated June 24, 1982, BLM informed Motorola that its right-of-way application would be treated as a proposal under the June 23, 1982, notice if specified additional information were provided. On October 1, 1982, the Motorola proposal was approved by BLM and a right-of-way granted to permit construction and operation of a multiple-user radio facility at Buck Mountain.

On December 6, 1982, appellants protested the grant to Motorola of rights-of-way for all purposes sought in connection with construction of the proposed tower and building and use of the Buck Mountain site. The protest recites appellants learned that Motorola had begun construction of a communications facility at Buck Mountain without a prior notice from BLM to appellants so as to provide them an opportunity to comment upon the construction. The protest complains that the tower height of the Motorola facility exceeds 50 feet, a variance from the proposed model commented upon during planning. The protest recites the higher tower will interfere with appellants' signals at the existing Buck Mountain stations and states the higher structure is not justified.

Appellants' statement of reasons expands upon this argument. Appellants point out that the tower and radio building are not in the positions

shown on Motorola's original design drawings submitted on July 23, 1981, but that the position of the two structures has been reversed. This results in a positioning, according to appellants, of the Motorola antenna next to appellants' towers, so as to mask their signals. To support this argument, an engineer's report is offered to describe the effects tower height and location will have upon signals to and from appellants' towers. The engineer's report, exhibit G to the statement of reasons, indicates, however, that the tower is complete and the facility is operating.

Appellants contend the right-of-way grant is defective because BLM violated provisions of 43 CFR 2800.0-2(c) and (d), 2802.3-4, and 2802.4(d)(1) and (d)(3) (1981). Thus, appellants contend BLM has (1) failed to require preparation of an environmental protection plan, or (2) an environmental analysis of the site development; and (3) has failed to ensure technological compatibility, (4) coordinate with local governments, or (5) consult with the Federal Communications Commission (FCC) concerning radio signal interference, in violation of Departmental regulations. Further, appellants claim they were denied their right to notice and comment accorded by Section VA4 of the Buck Mountain Communication Site Management Plan dated May 27, 1982, which provides:

Communications Site Application, Form 2860-1, as an attachment to the application, and the Radio Communication Technical Data Worksheet. After preliminary adjudication of the application has been completed, the Eugene District will send letters to all existing site users informing them of the new application and allowing 30 days for submission of comments. Comments which pertain to the technical electronic aspects of the proposal should be sent directly to the FCC or IRAC [Interdepartmental Radio Advisory Committee, with a copy to BLM. All comments should make reference to the applicants [sic] FCC/IRAC file number and city of broadcast. This information can be obtained directly from the applicant.

(Plan at 6).

[1] Arguments advanced by appellants claiming that BLM failed to comply with environmental control requirements imposed by Departmental regulation are not supported by the record on appeal. The BLM case file supplied contains a reasoned environmental assessment review completed on July 12, 1982, recommending against preparation of an environmental impact statement. This recommendation was adopted by BLM on July 14, 1982, in apparent compliance with 43 CFR 2802.3-4. An environmental assessment report (EAR) concerning the proposed use of the Buck Mountain site, approved July 12, 1982, also appears in the case file, in conformity to requirement of 43 CFR 2802.4(d)(1). The EAR discusses the effects of the proposal for increased use of the radio site upon wildlife, plants, water and air, and existing infrastructure. The EAR concludes the proposed construction is consistent with environmental concerns and reasonably required by indicated radio user demand. A supplemental EAR analyzing the impacts of Motorola's right-of-way application was approved August 23, 1982.

Appellants' statement of reasons and supporting engineer's report establish appellants are concerned primarily with the effect of electromagnetic

interference upon their radio signals at Buck Mountain. While they argue that this perceived interference is related to the placement and size of the Motorola tower, past decisions by this Board indicate that, at least so far as concerns the signals themselves, frequency transmission questions ought primarily be addressed to FCC. See, e.g., James W. Smith, 44 IBLA 275, 283 (1979).

However, as appellants point out, coordination and cooperation between BLM and FCC are required by 43 CFR 2802.4(d)(2) and (3) to ensure proper consideration is given to the rights of existing radio users when new applications for communication rights-of-way are considered. This coordinating responsibility was recognized by BLM when it summarized its duties in this regard at section V of its Buck Mountain Communication Site Management Plan:

It is an objective of the Bureau to assure proper coordination of Bureau procedures with the procedures of the Federal Communications Commission (FCC) and the Interdepartmental Radio Advisory Committee (IRAC) in processing communication site right-of-way applications. The FCC grants station assignments to government users. The Eugene District also intends to coordinate the consideration of future use authorizations with Willamette Industries and the public agency users presently situated on the adjoining private land.

(Plan at 5).

The record on appeal indicates that the communications site construction which appellants protested to BLM has, however, already taken place. Although the rule formerly was, as indicated in Smith, supra at 281, that once a protest of a communications right-of-way is received, all agency action should be suspended until the protest is decided, that is no longer true in cases involving rights-of-way. See 43 CFR 2804.1. See also 43 CFR 4.21(a). Be that as it may, in this case it is now apparent that, whatever the cause for appellants' failure to protest prior to the construction of the tower by Motorola, it did not make its objection to an "action proposed to be taken," but delayed until after the action was an accomplished fact. Departmental regulations and past decisions of this Board establish that an appeal coming before this Board from the denial of an untimely protest must be dismissed. 43 CFR 4.450.2; Horizon Exploration Co., 72 IBLA 43 (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge.

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

I agree that the protest filed by appellant Willamette Logging Communications, Inc., was not timely made under the applicable regulation, 43 CFR 4.450-2, and could not, therefore, be considered. See Goldie Skodras, 72 IBLA 120 (1983). Moreover, even if we treat its protest as an appeal from the grant of the right-of-way to Motorola, Inc. (Motorola), it was still clearly untimely. See 43 CFR 4.411.

Matters are less certain concerning the original protest filed on behalf of Springfield Radio Communications, Inc., on September 24, 1981. Clearly, this protest was filed prior to the grant of the right-of-way to Motorola. While this protest was apparently never directly dealt with by the District Office, it is obvious that the District Office considered that it was handling the protest in the course of its preparation of the management plan for the Buck Mountain Communication site. This would account for the fact that it was never expressly denied. In any event, however, appellants do not now assert that this earlier protest remained viable, and I think they must be estopped from asserting that this protest remained pending until December 3, 1982, when they submitted their second protest.

But, while I agree that this appeal must be dismissed under our procedural precedents, I think one of the matters which appellants have sought to raise, i.e., the role of the Bureau of Land Management (BLM) in policing communication sites to prevent electromagnetic interference with other licensees, may need considerable further examination both by BLM and, ultimately, this Board.

While it is true that in earlier cases such as James W. Smith, 44 IBLA 275 (1979), this Board indicated that concerns about electromagnetic interference should properly be addressed to the Federal Communications Commission (FCC), we subsequently noted in Peregrine Broadcasting Co., 62 IBLA 133 (1982), that the regulation which provided for joint FCC and BLM review of the question of radio interference caused by multiple broadcasting in close proximity at a site, 47 CFR 1.70, had been eliminated. This led the Board in that case to conclude that BLM properly considers such impacts in its issuance of communications site rights-of-ways. Id. at 138.

Moreover, appellants have submitted a report which indicates that historically neither the FCC nor the IRAC (Interdepartmental Radio Advisory Committee) has dealt with the "problem of electromagnetic compatibility generated by facilities operating in close physical proximity (up to several thousand feet) of each other or the shadowing of coverage of one facility by another due to close proximity," instead focusing on the problems of radio interference between spectrum users involving assumed separations of miles between the facilities. See Skinner Report on "Investigation of Adverse Impacts of Motorola Installation on BLM Land, Buck Mountain Oregon" at 2. Thus, even were the prior regulations still in effect, there is reason to believe that, unless BLM attempted to regulate the situation, no one else would. If such were the case, I think it would be incumbent upon BLM to step into the void.

While it is recognized that the Federal Government does not normally grant an exclusive right-of-way to an applicant, it is equally clear that the right of the Government to grant subsequent rights-of-way to secondary users is subservient to the right of the initial grantee not to have his permitted use interfered with. Thus, while the Government is free to grant rights-of-ways to secondary users, it can do so only where the effect of such grant is not to diminish the rights which it has already granted to earlier applicants. Therefore, if, in point of fact, a secondary use does result in interference with an earlier permitted use, such interference represents an infringement on BLM's earlier grant which BLM is obligated to attempt to ameliorate, even to the point of cancelling a subsequently issued right-of-way.

I note in the instant case that the Motorola tower has already been constructed. Thus, the question whether or not the tower results in electromagnetic interference is no longer a hypothetical one, but rather can be determined with some exactitude. If, in fact, electromagnetic interference is occurring which can be attributed to the effects of the tower, it is now BLM's obligation to attempt to rectify it, either by requiring Motorola to move the tower or by making such other arrangements as may be deemed efficacious. Thus, if appellants were correct in their fears that the tower would adversely affect their transmissions, they have a right, independent of their right to protest issuance of the right-of-way, to have such adverse effect remedied. Should BLM fail to respond to such a complaint to appellants' satisfaction, they could, at that time, seek review by this Board. However, inasmuch as the specific protest which they filed was untimely, I concur in the dismissal of this appeal.

James L. Burski
Administrative Judge.

